STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELANO UNION ELEMENTARY TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. DELANO UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-1062 PERB Decision No. 213 April 30, 1982

Appearances: Charles R. Gustafson, Attorney (California Teachers Association) for the Delano Union Elementary Teachers Association, CTA/NEA; Carl B. A. Lang III, Labor Relations Director (Schools Legal Service) for the Delano Union Elementary School District.

Before Gluck, Chairperson; Jaeger and Moore, Members.

DECISION

This matter is before the Public Employment Relations Board (PERB) as a result of the Delano Union Elementary School District's (District) exceptions to the proposed decision of the PERB hearing officer. The District was found to have violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act.[1] We affirm the decision of the hearing officer and adopt his findings of fact and

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[1]The Educational Employment Relations Act is codified at Government Code section 3540, et seq. All statutory references in this decision are to the Government Code unless otherwise noted.

conclusions of law insofar as they are consistent with our decision.

FACTS

On May 12, 1976 the Delano Union Elementary Teachers Association (Association) was voluntarily recognized by the District as the exclusive bargaining representative of all non-managerial certificated employees of the District. As a result of the discussions between the parties that ultimately lead to the recognition, they agreed to an appropriate unit for negotiating and certain employees in the position of "Migrant Resource Teachers" were excluded from the unit. This was accomplished pursuant to agreements to divide the resource teacher position into two classifications, designating one "District Resource Teacher" and the other "On-site Resource Teacher." They excluded the "District Resource Teacher" from the unit. District resource teachers were to have District-wide responsibilities for certain programs. On-site resource teachers were to have responsibilities at individual school sites.

As further factual background, we take note of information contained in this record, indicating that a set of cross unfair charges were filed by these parties with PERB in the fall of 1978.[2] These charges arose in part out of the alleged

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[2]The cases involved were LA-CO-59, filed 9/6/78 and LA-CE-390, filed 9/11/78.

participation of a District resource teacher in Association activities and the District's alleged unlawful response to that activity. In settling those charges, the parties agreed that they would jointly seek a modification of the certified unit in order to place District resource teachers in the unit.

The Association filed a unit modification petition with PERB on May 15, 1979. PERB was informed by the District that it did not oppose the unit modification. The PERB Los Angeles Regional Office was notified by the District that the posting period was completed on September 26, 1979 and on that same date a certification issued that added to the unit the positions of "District Migrant Resource Teacher" and "District Resource Teacher."

Two interwoven but separate acts are at issue here. For purposes of factual clarity we shall sectionalize below the two incidents that are the essence of the unfair charges.

Subsection 3543.5(a) Violation:

Ray Barney commenced employment with the District in 1971. He taught, over the course of his tenure, first and second grades, seventh and eighth grade reading, and eighth grade math.

By 1978 Barney was president of the Association and active in negotiations. He was asked by District Superintendent David Yetter on June 6, 1978, if he was interested in accepting a migrant resource teacher position.

Barney accepted the offer and he resigned his Association presidency to become a "District Migrant Resource Teacher" in August of 1978. Over the course of the 1978-79 school year Barney was reprimanded twice by the District for being involved in Association activities.

By May of 1979, the parties had moved toward a resolution of the dispute concerning the status of migrant resource teachers. The Association had filed the unit modification that would bring Barney's position into the unit. In July, the District went on record as unopposed to the modification. The posting period was completed on September 26, 1979 and on that same date a certification was issued by PERB.

During the period between the District's July 11, 1979 statement of support for the unit modification and the September 26, 1979 PERB certification, Ray Barney was a featured speaker at an Association meeting on September 17.

Barney's participation at this meeting was widely advertised. He primarily answered members' questions regarding contract provisions on class size, grievances and preparation time. Barney believed the unit modification had been completed prior to the date he spoke. Association President Mary-Lou Worley had mistakenly advised Barney that he was in the unit. In fact, however, Barney did not become a unit member for nine more days.

Regardless of the September 26, 1979 certification, on October 2, 1979, Barney received a formal letter of reprimand for speaking at the September 17, 1979 Association meeting.[3]

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[3]The letter of reprimand reads as follows:

> October 2, 1979
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> Mr. Raymond Barney
> Migrant Resource Teacher
> Delano Union School District
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> Dear Mr. Barney:
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> From copies of literature recently distributed to teachers in the collective bargaining unit, it appears that you have been involved in and perhaps conducted a meeting to explain the DUESTA/CTA/NEA collective bargaining agreement to DUESTA members.
>
> Your conduct in this matter is the cause for this letter of reprimand being written. The unit modification petition which DUESTA submitted to PERB is still in process and has not yet become final. As a consequence, you have involved yourself in a meeting of the collective bargaining unit while still a member of the management team. As such, your actions could bring liability to the employer for interference in the activities of the certificated employee organization.
>
> You have been warned one other time that you were to refrain from any contact or activities involving DUESTA while you were a member of the management team. You apparently have failed to adhere to this warning and have involved yourself in activities of the DUESTA. As a consequence,

That letter of reprimand was found by the hearing officer to violate subsections 3543.5(a) and (b).

Subsection 3543.5(c) Violation:

As a result of the 1976 contract negotiations, including the creation of the two positions of District and on-site resource teachers, the parties negotiated a salary and benefit schedule for teachers that did not include District resource teachers.

District resource teachers' salaries were paid according to a document entitled, "Management Support Personnel Salary Schedule." They worked ten more days per year and one-half hour more per day than on-site resource teachers. They received an annual salary which was more than $1,000 greater than the salary they would have received on the teacher salary schedule. The District resource teachers' existing salary schedule was not modified by the employer's subsequent agreement to include these employees in the unit.

On-site resource teachers' salaries were determined on the basis of an amalgam of factors. Beginning in 1974, resource teachers were paid an additional annual stipend of $1,000 to compensate for ten extra workdays per year and additional duty

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this letter of reprimand will be placed in your permanent file and made a part thereof.

Sincerely,

David E. Yetter
District Superintendent

in supervising migrant tutor aides. With the 1976 position division, on-site resource teachers continued to receive an additional $1,000 but they were required to work only an additional five days annually and their hours required an additional one-half hour per day more than regular classroom teachers.

The contract between the parties does not spell out the unique salary and working conditions of the on-site resource teachers. However, past practice indicates that the parties have had no disagreement about salaries and working conditions for on-site resource teachers despite the lack of contractual specificity.

As previously noted, in May of 1979 the Association formally filed a unit modification petition with PERB. The parties had engaged in discussions leading to this step during the course of the 1978-79 school year. This petition represented a first step toward the ultimate resolution of the long-standing District resource teacher status problem.

On November 26, 1979, the Association requested negotiations. It submitted a negotiating proposal concerning wages and hours of District resource teachers the following day. The school board conducted a public hearing[4] of the

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[4]Section 3547 requires that all initial proposals of exclusive representatives and public school employers be presented at a public meeting for comment by the public before meeting and negotiating on the proposals take place.

Association proposal on December 12, 1979. Thereafter the parties met and negotiated until the hearing in this matter.

In the six months between the May petition to modify the unit and the November 26, 1979 request for negotiation, the Association did not present any proposals.[5] Association President Worley testified she believed the modification was completed before the Association meeting of September 17, 1979. It actually was not final until September 26, 1979.

On the very next day, September 27, 1979, the school District board of trustees adopted a resolution which placed the District resource teachers on the regular teacher salary schedule with the additional stipend, workday length and school term of on-site resource teachers. This placed the District resource teachers at parity with on-site teachers but unilaterally changed their established pay, hours and term length.

The September 27, 1979 board of trustees actions were found by the hearing officer to violate subsections 3543.5(a), (b) and (c).

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[5]Good labor relations practices would disclose early discussions over the impending unit addition. No evidence in the record indicates such anticipation of the issue. We take note that no duty to bargain arises until the unit is certified and therefore the Association could not have made a statutory demand to negotiate on any proposal until September 26, 1979. This delay is unfortunate but legally irrelevant.

DISCUSSION

Subsection 3543.5(a) and (b) Violation:

Subsection 3543.5(a) prohibits public school employers from imposing reprisals on employees, discriminating against or otherwise interfering with employees "because of their exercise of rights guaranteed by this chapter." Subsection 3543.5(b) prohibits public school employers from denying employee organizations rights guaranteed to them by the Act. These subsections read in concert with section 3543[6] guarantee public school employees and their organizations the right to participate in the activities of employee organizations free from adverse consequences.

Ray Barney was reprimanded for speaking at the September 17, 1979 Association meeting. In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, we enunciated the applicable test for alleged violations of subsection 3543.5(a). We determined that, in an interference case, the charging party must present sufficient evidence to establish that the respondent's conduct tends to or does result in some

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[6]Section 3543 provides, in relevant part, as follows:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

harm to employee rights guaranteed by the Act. This evidence must demonstrate a nexus between the respondent's act and the exercise of a statutory right vested in the charging party, thereby establishing a prima facie case. The respondent must then produce evidence sufficient to establish that, on balance, respondent's bona fide business interests outweigh the harm to employee rights.

The District does not deny that speaking at an Association meeting is protected activity, but rather asserts that Barney was not an "employee" within the meaning of subsection 3540.1(j) of the Act.[7]

It is undeniable that Barney was not yet a unit member on September 17. However, being outside the unit does not establish that he was not an "employee" within the meaning of EERA. The parties' prior agreement to exclude these employees as managers is not binding on the Board. Accordingly, an examination of an individual's duties is the proper inquiry to

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[7]Subsection 3540.1(j) states:

> "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

determine managerial status, and the burden of proof is the District's. Commercial Movers, Inc. (1979) 240 NLRB No. 24 [100 LRRM 1206]; Unit Determination for the State of California (12/31/80) PERB Decision No. 110c-S.

The record provides substantial support for the conclusion of the hearing officer that Barney was not a management or supervisory employee on September 17.[8] Barney had no

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[8]These various terms are defined in section 3540.1 as follows:

> . . . . . .
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> (g) "Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.
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> . . . . . .
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> (m) "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

significant responsibility for formulating policy or administering District programs. Oakland Unified School District (11/25/81) PERB Decision No. 182. Barney did not hire, discharge, assign or discipline other certificated employees. New Haven Unified School District (3/22/77) EERB Decision No. 14. Indeed, beyond the District's legally dispositive failure to meet its burden of proving Barney's management status, we are mindful of the District's agreement to the propriety of designating these individuals as "employees" and including this position in the unit months before the September 17 Association meeting.

We conclude that Barney is an employee under the Act and that he has established a prima facie case. The District offers no argument that its conduct with respect to Barney was excused by operational necessity. We therefore affirm the findings of fact and conclusions of law of the hearing officer that the District violated subsections 3543.5(a) and (b) by reprimanding Mr. Ray Barney for participating in the September 17, 1979 Association meeting.

Subsection 3543.5(c) Violation:

The first legally significant action in this case occurred on May 15, 1979 when the unit modification petition was filed. The District indicated its acceptance of this modification on July 11, 1979. From that date forward the parties had constructive notice of the impending addition of District

resource teachers to the unit. On September 26, the Los Angeles Regional Director issued a certification that the subject positions had been added to the unit, after notification by the District of completion of the posting period.[9]

This certification triggered the parties' legal obligation to meet and negotiate. The next day, September 27, 1979, the District board of trustees passed a resolution that changed the pay, work hours and workyear of District resource teachers. It did so without benefit of negotiation with the Association.

The District argues that the Association waived its right to meet and negotiate.

Before a District can take unilateral action affecting a matter within the scope of representation[10] it must give

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[9]The posting requirements as set forth at title 8, California Administrative Code, section 33262 were:

> (a) The employer shall post a notice of the petition within five workdays following its filing of or receipt of a copy of the petition.
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> (b) The notice shall be posted conspicuously on all employee bulletin boards in each facility of the employer in which members of the unit(s) claimed to be appropriate are employed.
>
> (c) The notice shall remain posted 15 workdays.

[10]The parties do not dispute the fact that the subject matter of the alleged unilateral change falls within the scope

notice and an opportunity to negotiate to the exclusive representative. Oakland Unified School District (4/23/80) PERB Decision No. 126, enfd. 120 Cal.App.3d 1007 (1981); Davis Unified School District et al. (12/22/80) PERB Decision No. 116. A waiver of that opportunity to negotiate will not be found absent clear and unmistakable language or demonstrative

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of representation as defined by section 3543.2. That section states:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. Sutter Union High School District (10/7/81) PERB Decision No. 175; Insulating Fabricators, Inc. (1963) 144 NLRB No. 125.

The duty to bargain concerning the District resource teachers legally arose on September 26, 1979 when the PERB certification issued. Nothing in the record demonstrates that the District gave the Association the opportunity to bargain before it took its unilateral action on September 27, 1979. Once the District made its unilateral decision, one day after the certification, it denied the Association the opportunity to bargain and it demonstrated a decision firmly made to unilaterally change the wages, hours and term-length of the new unit members. We find no behavior in that 24-hour period from which we can infer a waiver of the right to negotiate.

The District also argues that this change in compensation was simply a withdrawal of that sum of money attributable to the position's management duties. Since we have previously determined that these employees were not managerial, the District could not base the reduction of wages on the withdrawal of "management duties." We therefore reject this argument.

We affirm the findings of fact and conclusion of law of the hearing officer that the District violated subsections 3543.5(a), (b) and (c).

REMEDY

We affirm the appropriateness of the hearing officer's remedy including return to the status quo ante.

The Board further orders that the parties return to the negotiating table if they have not already done so, should the Association so request, to negotiate the wages, hours and term length of District resource teachers.

The District shall also be required to sign and post the Notice to Employees attached to this decision as an appendix.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Government Code subsection 3541.5(c) of the Educational Employment Relations Act, it hereby is ORDERED that the Delano Union Elementary School District board of trustees, superintendent and their respective agents shall:

A. CEASE AND DESIST FROM:

1. Imposing reprisals on Raymond Barney by retaining or otherwise giving any force or effect to the letter of reprimand dated October 2, 1979 which was placed in the personnel file of Mr. Barney by District Superintendent David Yetter, in violation of Government Code subsections 3543.5(a) and (b).

2. Unilaterally affecting the wages, hours and length of the working year of District resource teachers by

giving any force or effect to the September 27, 1979 resolution of the District board of trustees which placed District resource teachers on the same salary schedule with other teachers and shortened the length of the workday and work year of District resource teachers, in violation of Government Code subsections 3543.5(a), (b) and (c).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Remove the October 2, 1979 letter of reprimand from the personnel file of Raymond Barney and destroy it and all copies which exist in District personnel records.

2. Reinstate, retroactive to September 27, 1979, the schedule and make whole all persons who thereafter served in the position of the District resource teacher for any losses in wages or benefits which they incurred as a result of the District's unilateral abolition of that salary schedule, together with interest paid at the rate of seven percent per annum.

3. Immediately reinstate for all District resource teachers, the work hours and workyear which were in effect prior to September 27, 1979.

4. Upon demand, meet and negotiate in good faith with the Delano Union Elementary Teachers Association, CTA/NEA, about the wages, hours, workyear and other matters within the scope of representation for District resource teachers.

5. Within seven (7) workdays after the date of service of the decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the Notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the notices are not altered, reduced in size, defaced or covered with any other material.

6. Within forty-five (45) consecutive workdays from the service of the final decision herein, notify the Los Angeles regional director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this decision. All reports to the regional director shall be served concurrently on the charging party herein.

This order shall become effective immediately upon service of a true copy thereof on the Delano Union Elementary School District.

By: _____
John W. Jaeger, Member

_____
Barbara D. Moore, Member

Chairperson Gluck's concurrence and dissent begins on page 19.

Harry Gluck, Chairperson, concurring and dissenting:

I concur in the conclusions reached by the majority. By its consent to the unit modification, the District had already conceded Barney's employee status prior to his appearance at the union meeting. Even a mistaken belief as to the status of an employee has been held not to exonerate interference with protected activities. See NLRB v. Burnup & Sims Inc. (1964) 379 U.S. 21 [57 LRRM 2385]. The District simply had no legitimate business justification for the reprimand. See Carlsbad, supra, and Novato Unified School District (4 /30/82) PERB Decision No. 210.

I disagree with the majority's make-whole remedy. The affected employees have worked a reduced schedule of hours for the past two and one-half years. It is punitive to require that they be paid for hours not worked; it is unreasonable to reinstate the longer work schedule, absent evidence that those extra hours of work are required. The parties opened negotiations two months after the unilateral change and unit modification order and were still meeting when the unfair practice hearing closed. The majority has not considered that settlement of this issue may have been reached. Therefore, I would limit the back-pay award to an amount reflecting the

reduced work schedule and limited to the period commencing on the date the unilateral wage change was made and ending when the parties reached agreement or final impasse.

Harry Gluck, Chairperson

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-1062, Delano Union Elementary Teachers Association, CTA/NEA v. Delano Union Elementary School District, in which all parties had the right to participate, it has been found that the Delano Union Elementary School District violated the Educational Employment Relations Act, Government Code subsections 3543.5(a), (b) and (c).

As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

A. CEASE AND DESIST FROM:

1. Imposing reprisals on Raymond Barney by retaining or otherwise giving any force or effect to the letter of reprimand dated October 2, 1979 which was placed in the personnel file of Mr. Barney by District Superintendent David Yetter, in violation of Government Code subsections 3543.5(a) and (b).

2. Unilaterally affecting the wages, hours and length of the working year of District resource teachers by giving any force or effect to the September 27, 1979 resolution of the District board of trustees which placed District resource teachers on the same salary schedule with other

teachers and shortened the workday and workyear of District resource teachers, in violation of Government Code subsections 3543.5(a), (b) and (c).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Remove the October 2, 1979 letter of reprimand from the personnel file of Raymond Barney and destroy it and all copies which exist in District personnel records.

2. Reinstate, retroactive to September 27, 1979, the schedule and make whole all persons who thereafter served in the position of the District resource teacher for any losses in wages or benefits which they incurred as a result of the District's unilateral abolition of that salary schedule, together with interest paid at the rate of seven percent per annum.

3. Immediately reinstate for all District resource teachers, the work hours and workyear which were in effect prior to September 27, 1979.

4. Upon demand, meet and negotiate in good faith with the Delano Union Elementary Teachers Association, CTA/NEA, about the wages, hours, workyear and other matters within the scope of representation for District resource teachers.

5. Within forty-five (45) consecutive workdays from the service of the Decision herein notify the Los Angeles regional director of the Public Employment Relations Board in

writing of what steps the employer has taken to comply with the terms of this Decision. All reports to the regional director shall be served concurrently on the charging party herein.

Dated: _____ DELANO UNION ELEMENTARY SCHOOL DISTRICT

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 30 WORKING DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, REDUCED IN SIZE, DEFACED OR COVERED WITH ANY OTHER MATERIAL.